

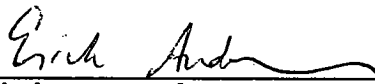
Erich D. Andersen
8365 Fairlane Dr. #10
Birch Run, MI 48415

September 25, 1990

Dear Communications Director:

Please find enclosed one copy of my article on the "abuse of a position of trust" enhancement provision in the Sentencing Guidelines. The article is to be published in the Oregon Law Review. I send it in response to the Commission's call for comments on Guideline section 3B1.3.

I hope that my article may be of some use to the Commission. I may be reached at the above address if the Commission should have any questions or comments. Thank you.



Erich D. Andersen

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 626-8500
FAX (202) 662-7631

William W. Wilkins, Jr. Chairman
Julie E. Carnes
Helen G. Corrothers
Michael S. Gelacak
George E. MacKinnon
A. David Mazzone
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Paul L. Maloney (ex officio)



October 4, 1990

Mr. Erich D. Anderson
8365 Fairlane Dr. #10
Birch Run, MI 48415

Dear Mr. Anderson:

On behalf of the Commission, I thank you for your sending me your article examining the "Abuse of Position of Trust" adjustment in the guidelines. Your submission has been distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

I appreciate your consideration in making a copy available to the Commission.

Regards,

A handwritten signature in black ink, appearing to be "PKM", written over a circular stamp or mark.

Paul K. Martin
Communications Director

ENHANCEMENT FOR "ABUSE OF A POSITION OF TRUST"

UNDER THE FEDERAL SENTENCING GUIDELINES

Erich D. Andersen¹

Many criminal offenses contain an aspect which the United States Sentencing Commission has called an "abuse of a position of public or private trust."² One example is insider trading. This offense characteristically involves the unauthorized use, by some insider, of confidential corporate or market information for personal gain.³ The insider occupies a position of trust, which he abuses when he takes such information and uses it to obtain money or advancement.⁴

¹ Law Clerk to the Honorable James P. Churchill, Senior United States District Judge for the United States District Court for the Eastern District of Michigan; Former Law Clerk to the Honorable Diarmuid F. O'Scannlain, United States Circuit Court Judge for the United States Court of Appeals for the Ninth Circuit; B.A. 1986, J.D. 1989, University of California, Los Angeles. I would like to thank my wife, Anne Read-Andersen, and my friend and former colleague, Joseph D. Kearney, for their valuable criticism and editing suggestions. Rosa Kim and Fred Isaacs also made helpful comments on an early draft of this article. This article is dedicated to my wife, Anne.

² See, e.g., United States Sentencing Commission, Guidelines Manual § 3B1.3, at 3.7 (1989) [hereinafter "Guidelines Manual"] (reproduced in the appendix to this article).

³ See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 883 (2d Cir. 1968), cert. denied, 404 U.S. 1005 (1971).

⁴ See Guidelines Manual § 2F1.2, Commentary, Application Note 1, at 2.74. As this article discusses below, the Commission has restricted application of the adjustment in the area of insider trading to those persons who occupy positions of "special trust." Id. The Commentary indicates that such persons include corporate

Where the abuse of a position of trust is an aspect of the offense, there is no need to provide for an additional enhancement for this fact.⁵ Where the punishment for the offense itself does not account for the abuse, however, an enhancement is proper because of the additional element of culpable behavior.⁶ Accordingly, the Sentencing Commission has provided, in the federal Sentencing Guidelines, for an upward adjustment in a criminal's base offense level when the defendant has "abused a position of public or private trust . . . in a manner that significantly facilitates the commission or concealment of the offense."⁶

As recent cases reveal, however, it is sometimes difficult to

presidents and attorneys, but not tpees. Id.

⁵ In United States v. Reich, 661 F. Supp. 371, 377 (S.D.N.Y. 1987), the district court discussed in hypothetical terms whether the "abuse of a position of trust" adjustment, contained in section 3B1.3 of the Sentencing Guidelines, is built into a notion of insider trading. The court ultimately did not resolve the question because Reich was a pre-Guidelines case.

The Sentencing Guidelines now make it clear that the abuse of a position of trust notion is not built into the offense of insider trading. This is why the Commentary to the guideline section on insider trading authorizes the adjustment for defendants who occupy positions of "special trust." See supra note 4.

⁶ In its discussion of section 3B1.3 of the Guidelines, the Commission explains that the adjustment is appropriate because persons who abuse positions of trust "generally are viewed as more culpable." Guidelines Manual § 3B1.3, Commentary, Background, at 3.7. The Commission has been criticized in the past for not sufficiently articulating the underlying purposes of such provisions. See Ogletree, The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 Harv. L. Rev. 1938, 1952-53 (1988); Weigel, The Sentencing Reform Act of 1984: A Practical Appraisal, 36 UCLA L. Rev. 83, 99-103 (1988).

⁶ Guidelines Manual § 3B1.3, at 3.7 (reproduced in full in the appendix to this article). While section 3B1.3 provides for an adjustment where a defendant uses a "special skill" to commit or conceal a crime, this article will only address the "abuse of a position of trust" enhancement contained in that section.

determine when a person has abused a "position of trust."⁷ Courts have not limited their findings of abuse to obvious areas such as insider trading or fraud by elected officials. They have authorized the adjustment for criminal conduct by a janitor,⁸ a security guard,⁹ a baby sitter,¹⁰ and a bank loan clerk.¹¹

While applying the adjustment in this expansive manner, however, almost every federal circuit court addressing the issue at any length has struggled to find limits on application of the adjustment.¹² Perhaps because of the confusion, the Sentencing Commission has asked for "comment . . . as to whether this guideline or commentary should be amended to more clearly specify the types of conduct to which this adjustment is intended to apply."¹³

This article will offer several recommendations for amendment. All of these recommendations arise out of a view, developed by study in this area, that the "abuse of a position of trust" concept has the potential for being interpreted so broadly that it will

⁷ See infra, at 7-13.

⁸ See United States v. Drabeck, No. 89-30237, slip op. 6083, 6090 (9th Cir. June 14, 1990).

⁹ See United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491, 3516 (2d Cir. May 7, 1990).

¹⁰ See United States v. Zamarripa, No. 89-2145, slip op. 1, 506 (10th Cir. June 11, 1990) (reversing district court's departure from the Guidelines and holding that the conduct was adequately accounted for in section 3B1.3 of the Guidelines).

¹¹ See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

¹² See, e.g., Drabeck, No. 89-30237, slip op. at 6089-90.

¹³ 55 Fed. Reg. 5739 (Sent. Comm'n 1990).

apply whenever a defendant commits a crime in, or related to, the workplace. To avoid this result, the Sentencing Commission should more narrowly define a "position of trust" for the purposes of sentence enhancement and impose a tighter causation requirement.

Before turning to specific recommendations, this article will briefly explain how the abuse of a position of trust adjustment fits into the recent history of criminal sentencing and the new Guidelines scheme. Next, it will consider the obstacles that courts have encountered in applying the adjustment. The article will then discuss how the Commission has accounted for the abuse of a position of trust in the base offense levels and specific offense characteristics of certain crimes. Finally, the article will offer and explain a proposal that the Sentencing Commission change the abuse of a position of trust adjustment from one of general application in the Guidelines to one of limited application.

I. THE RETURN OF RETRIBUTIVE SENTENCING

The federal Sentencing Guidelines arose out of a minor revolution in criminal sentencing that occurred in the 1970s and 1980s.¹⁴ This revolution was fought largely over the purposes and goals of criminal sentencing and the role of judges in the process.

¹⁴ For a good digested version of the history of criminal sentencing in this country, see United States v. Scroggins, 880 F.2d 1204-08 (11th Cir. 1989). Scroggins suggests that the retribution model of sentencing prevailed in the early part of this country's history and slowly gave way to a "medical model," which emphasized rehabilitation and flourished in the 1960s. By 1984, the rehabilitation goal was on the wane. Congress began to acknowledge that "[w]e know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated." S. Rep. No. 225, 98th Cong., 2d Sess. 40.

Before the revolution, federal criminal law was strongly influenced by a rehabilitative model of criminal sentencing.¹⁵ The rehabilitative model assumed that it was possible through criminal penalties to change offenders so that they would not commit future crimes. During the 1970s, however, a number of commentators expressed opposition to this theory.¹⁶ They argued that the probation and parole system was a sham and that prisons did not rehabilitate.¹⁷

The new thinking was, in fact, largely a return to an emphasis on retribution theory with some concrete ideas about

¹⁵ See, e.g., Williams v. New York, 337 U.S. 241, 248 ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."); Ind. Const. Art. 1 (1978) (the "penal code shall be founded on the principles of reformation and not of vindictive justice"); see generally A. Campbell, Law of Sentencing 31-41 (1978) [hereinafter "Law of Sentencing"].

¹⁶ See, e.g., M. Frankel, Criminal Sentences: Law Without Order ch.9 (1973); A. von Hirsch, Doing Justice: The Choice of Punishments ch. 6, 15-17 (1985); P. O'Donnell, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform ch. 6-10 (1977); N. Morris, Madness in the Criminal Law 145 (1982) ("Sentencing reform has been influenced intellectually and theoretically by an effort to minimize sentences and the hypocrisy of adjusting prison terms to supposed indicia of rehabilitation demonstrated in prison, and by a trend toward models of guided discretion in judicial sentencing"); Winick, Legal Limitations on Correctional Therapy and Research, 65 Minn. L. Rev. 331-422 (1981).. See also Scott L. v. State, 760 P.2d 134 (Nev. 1988) (Nevada holds that retribution and "just desserts" remain appropriate sentencing rationales).

¹⁷ Despite this movement towards giving retribution a greater role in criminal sentencing, the rehabilitation model still has persuasive advocates. See, e.g., Law of Sentencing at 26 (Supp. 1989) ("despite popular support for the vindication rationale, such notion is in fact a capitulation to mankind's basest instincts . . . [and] was the primary impetus behind sentences of torture, mutilation, and slow death that characterized the Middle Ages.").

implementation. Two theories which gained early adherents were so-called "flat sentencing" and "presumptive sentencing" systems.¹⁸ "Flat sentencing" involved assessing a set sanction against every person convicted of committing a certain crime. Once a sentencing court determined the sentence for the individual offender, the sentence would become "flat," meaning that the defendant would have to serve the entire, or almost the entire, term. The similar "presumptive sentencing system" dictated that each crime would carry a presumptively correct standard penalty. That penalty, however, could be augmented or reduced by aggravating or mitigating factors.¹⁹

Elements of this "presumptive sentencing system" found their way into the current federal Sentencing Guidelines. The Guidelines operate on a system that assumes a standard penalty for a given offense, which can be adjusted upwards or downwards depending upon whether the defendant abused a position of public or private trust in such a way as to facilitate the commission or concealment of the offense.

By the time the Guidelines came into being, however, several states had adopted different forms of determinative or presumptive sentencing systems.²⁰ Most of the states devised some sort of

¹⁸ See generally, George, The Comprehensive Crime Control Act of 1984 406-07 (1989) (looseleaf).

¹⁹ Id.

²⁰ See S. Rep. No. 98-225, 98th Cong., 2d Sess. 61-62, reprinted in, 1984 U.S. Code Cong. & Admin. News 3182 [hereinafter "Crime Control Report"] (discussing state legislation).

guidelines to control the exercise of judicial discretion.²¹ State courts accepted the constitutionality of these provisions.²²

The executive and legislative branches of the federal government soon became interested in the idea of developing a comprehensive federal sentencing system centered on a retributive philosophy.²³ Congress was concerned not only that the sentencing laws did not always reflect the new thinking, but also that a great disparity existed in the penalties for various crimes.²⁴ Congress acknowledged that some of the blame for such disparity should be placed at its feet. It had selected penalties in a haphazard manner over the decades and had not undertaken to create a Federal

²¹ See id.

²² See, e.g., Juneby v. State, 641 P.2d 823 (Alaska App. 1982).

²³ See, e.g., Crime Control Report at 38:

In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.

²⁴ Id.

Criminal Code to iron out the discrepancies.²⁵ Congress laid much of the blame for disparate sentences, however, at the door of the federal courts.²⁶ The new system would take away much of this judicial discretion in sentencing matters to remove the perceived disparities.

The initial answer to the problem of how to focus and revise the federal criminal sentencing laws was the Sentencing Reform Act of 1984.²⁷ Congress endeavored in this Act to iron out some of the disparities in existing penalty provisions by setting out a system of offense classifications.²⁸ Congress left the process of working out the details of this system, however, to the United States Sentencing Commission.²⁹ The Sentencing Commission was charged with the task of devising federal Sentencing Guidelines for Congressional approval.³⁰

²⁵ See Crime Control Report at 39; see generally George at 409-10.

²⁶ See, e.g., supra note 23.

²⁷ See Public Law 98-473, 98 Stat. 1976. See generally diGenova & Belfiore, An Overview of the Comprehensive Crime Control Act of 1984 -- The Prosecutor's Perspective, 22 Am. Crim. L. Rev. 707 (1985); Reznick, The New Federal Sentencing Provisions, 22 Am. Crim. L. Rev. 785 (1985).

²⁸ See 28 U.S.C. § 991(b)(1)(B), 3559; see also United States v. La Guardia, 902 F.2d 1010, 1013 (1st Cir. 1990) ("Uniformity in sentencing was undeniably a primary goal of Congress and the Sentencing Commission in establishing a neotenic sentencing framework").

²⁹ See 28 U.S.C. §§ 991-98, 3553(b). The Guidelines became effective on November 1, 1987, and survived a constitutional challenge in 1989. See Mistretta v. United States, 109 S. Ct. 647 (1989).

³⁰ See 28 U.S.C. § 991.

II. THE STRUCTURE OF THE GUIDELINES

The federal Sentencing Guidelines provide a comprehensive scheme for criminal sentencing that is intended to limit the role and discretion of judges.³¹ In a typical one-offense sentencing under the Guidelines, the district court will consult a mandatory presentence report prepared by a probation officer³² and take the following steps to ensure that the report leads to the proper sentence: (1) look up the statute of conviction in the statutory index; (2) find the "base offense level" for that crime; (3) consider certain "specific offense characteristics," such as the possession of a gun during the commission of the offense; (4) determine if any "adjustments" from chapter three of the Guidelines apply (these adjustments account for, among other things, the defendant's role in the offense and the status of the victim); (5) calculate a "criminal history score" on the basis of the defendant's past criminal record; (6) determine the defendant's guideline range based upon the sum of the above factors by looking at a sentencing table contained in the Guidelines; (7) determine the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution; and (8) refer to "specific offender characteristics" for additional adjustments.³³ After considering these factors, the sentencing

³¹ See Weigel, supra note 6, at 89.

³² See Fed. R. Crim. P. 32(c)(1).

³³ See Guidelines Manual § 1B1.1, at 1.13 (application instructions); Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 6-7 (1988) (article by United States Sentencing Commissioner and United States Circuit Judge Stephen Breyer); Wilkins & Steer, Relevant

judge may "depart" from the range indicated by the Guidelines if there are unusual factors, not taken into account by the Guidelines, which warrant such a departure.³⁴

Under the Guidelines, an "abuse of a position of trust" may factor into the defendant's sentence as an adjustment,³⁵ a built-in aspect of an offense,³⁶ or a specific offense characteristic.³⁷ Section 3B1.3 of the Guidelines provides for a general upward adjustment when the defendant has "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense."³⁸ There should be no adjustment, however, "if an abuse of trust . . . is included in the

Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 497-500 (1990) (article by United States Sentencing Commissioner and General Counsel of the United States Sentencing Commission).

³⁴ Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guideline if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Guidelines Manual § 5K2.0, at 5.42. The Supreme Court recently took certiorari of a case addressing the issue of whether the defendant should have an opportunity to comment before a district court imposes a sentence based upon a departure under the Guidelines. See United States v. Burns, appeal taken from D.C. Cir., cert. granted, No. 89-7260 (July 31, 1990).

³⁵ See Guidelines Manual § 3B1.3, at 3.7.

³⁶ See, e.g., id. § 2C1.3, at 2.36 (stating that adjustment provided for in section 3B1.3 should not be applied).

³⁷ See, e.g., id. § 2C1.2, at 2.35 (adjustment provided for in section 3B1.3 should not be applied, but only because specific offense characteristic provides for eight-point enhancement where elected official offers, gives, solicits, or receives a gratuity on account of an official act -- that is, where he abuses a position of trust).

³⁸ Id. § 3B1.3, at 3.7.

base offense level or specific offense characteristic" of the crime for which the defendant has been convicted.³⁹ In such circumstances, the "abuse of a position of trust" adjustment would result in unfair double-punishment.

III. THE GENERAL ADJUSTMENT OF SECTION 3B1.3

The general sentencing adjustment provided for in section 3B1.3 has two "prongs." The first prong requires the sentencing court to ask whether the defendant has "abused a position of public or private trust."⁴⁰ The second prong requires that the court determine whether such abuse has "significantly facilitated the commission or concealment of the offense."⁴¹

For discussion purposes, it is useful to consider these two prongs independently. Each prong presents its own analytical problems, and the courts have begun to look at section 3B1.3 as requiring a two-step analysis.⁴²

A. The "Abuse of a Position of Trust" Prong

The courts have had tremendous difficulty in determining what it means to "abuse a position of public or private trust." The word "trust" has a broad meaning that can encompass all kinds of relationships. Viewed broadly, "trust" is an "assured reliance on

³⁹ Id.

⁴⁰ Guidelines Manual § 3B1.3, at 3.7.

⁴¹ Id.

⁴² See, e.g., United States v. Foreman, No. 89-50038, slip op. 6191, 6197-6201 (9th Cir. June 19, 1990).

some person or thing: a confident dependence on the character, ability, strength, or truth of someone or something."⁴³ Viewed narrowly, "trust" can imply only a fiduciary relationship created by law. Thus far, the courts have indicated only that a "position of trust" under the Sentencing Guidelines involves certain characteristic features.

In United States v. Drabeck, the United States Court of Appeals for the Ninth Circuit focused on the lack of supervision accorded a criminal defendant in upholding application of the adjustment.⁴⁴ Defendant Drabeck worked for a janitorial service, which had a cleaning contract with a certain bank. As an incident of his job, Drabeck had keys to the bank and often worked unsupervised after the bank was closed. One evening when no bank employees were present, he removed \$6,300 in traveler's checks from the bank's coin vault, located in an area where the general public was not allowed to enter. To get into the vault, Drabeck had to turn the handle of the vault door, which was either unlocked or defective.

Drabeck pleaded guilty to one count of bank larceny. In sentencing him, the district court applied an upward adjustment for

⁴³ Webster's Third New International Dictionary 2456 (1986). Note that courts often turn to the dictionary when terms used in the Guidelines are ambiguous. See, e.g., Foreman, slip op. at 6189 (construing term "facilitate" in Guideline § 3B1.3 by reference to dictionary definition); cf. United States v. Brannan, No. 89-50016, slip op. 2647, 2653 (9th Cir. Mar. 12, 1990) (relying in part on dictionary definition of "counterfeit" in affirming conviction of defendant for use of a "counterfeit access device" in violation of 18 U.S.C. § 1029(a)(1)).

⁴⁴ See United States v. Drabeck, No. 89-30237, slip op. 6083, 6086-90 (9th Cir. June 14, 1990).

an abuse of a position of trust. Drabeck appealed, arguing that "Guideline § 3B1.3 was not meant to apply to any person lower on . . . the 'hierarchy of fiduciary responsibility' than an ordinary bank teller."⁴⁵ A janitor, Drabeck argued, is lower on this hierarchy and therefore he should not have received the adjustment for stealing the traveler's checks.⁴⁶

The Ninth Circuit disagreed. It first observed that the Commentary to section 3B1.3 does indeed identify the "ordinary bank teller" as a person who does not "abuse a position of trust" when he/she embezzles from a bank.⁴⁷ The court reasoned, however, that the "lack of supervision over the defendant distinguishes him sufficiently from an ordinary bank teller such that the exception from the enhancement that the Commentary affords the [bank] teller is inapplicable to [Drabeck]."⁴⁸

At first glance, the court's point about a lack of supervision makes sense. A janitor often works when the bank is closed and there are no other employees around to watch him. Because of this lack of supervision, the bank management is less aware of the janitor's possible mischief and must place more trust in him than the "ordinary bank teller," who is closely supervised all day.

A second look, however, reveals that a lack of supervision does not necessarily suggest a position of trust. The janitor is

⁴⁵ Id. at 6089.

⁴⁶ Id.

⁴⁷ See id. at 6087-88 (discussing Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7).

⁴⁸ Id. at 6088.

not as closely supervised as the bank teller precisely because he has fewer opportunities to engage in criminal mischief that will be costly to the bank. The janitor does not have ready access to money and receipts, as does the "ordinary bank teller." Such realities suggest that a lack of supervision may not be so much an indication that the janitor occupies a position of trust, as an indication that the janitor's job is less likely to afford him an opportunity for perpetrating a crime that will be very costly to the bank. In short, it does not necessarily follow that the janitor is in a greater position of trust than the ordinary bank teller simply because the janitor is less supervised.⁴⁹

Other cases focus less on the lack of supervision factor and more on the defendant's authority and control over the crime scene or victim. In United States v. Ehrlich, the defendant was a bank loan clerk responsible for "loan balancing." This job entailed verifying that the bank's general ledger account totals matched those of the bank's data processing company. Ehrlich would file debit and credit slips to correct the balances of the affected accounts caused by clerical, data entry, or computer error in the

⁴⁹ It is possible that the Commission intended the cryptic "ordinary bank teller" example to provided guidance not so much for the "position of trust" prong as the facilitation prong. The idea would be that the bank teller's job does not facilitate the commission of the offense of embezzlement because the bank teller is in no better position to embezzle than any number of people who work in financial institutions. The Commission, however, simply does not tell us what the ordinary bank teller example is supposed to illustrate. Thus, the courts tend to look to the example as a paradigm for application of the adjustment in all its facets. The bold courts threaten to disregard the counter-intuitive example altogether, see Drabeck, slip op. at ___, but most simply sail through the fog without a sextant, not minding that they cannot see the coastline.

computer balancing process. Ehrlich manipulated this loan balancing process in such a way as to embezzle money from the accounts. A jury found her guilty of embezzlement and the district court imposed sentence, including a two-point upward adjustment for abuse of a position of trust under section 3B1.3 of the Guidelines. Ehrlich appealed, alleging among other things that the trial court erred in applying the adjustment. In particular, Ehrlich argued that her job was like that of an ordinary bank teller.⁵⁰

The Fifth Circuit rejected the argument, emphasizing that Ehrlich was in a position of greater trust than the ordinary bank teller because she had extraordinary authority over the bank's accounts. "Ehrlich's position gave her the authority to routinely initiate loan balancing transactions."⁵¹ "Ehrlich was given the authority to balance the loan suspense account, which she debited to effect three of the six embezzlements."⁵² "This account is large and important, and . . . the bank assigns control of the loan suspense account only to employees deemed trustworthy and highly responsible."⁵³

The Tenth Circuit also focused on authority and control in applying the abuse of a position of trust adjustment to a baby

⁵⁰ See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

⁵¹ Id. at 331 (emphasis added).

⁵² Id. (emphasis added).

⁵³ Id. (emphasis added).

sitter who sexually abused the child he was hired to watch.⁵⁴ In United States v. Zamarripa, the district court had departed from the sentencing range indicated by the Guidelines to take into account the special circumstances surrounding the defendant's crime. The Tenth Circuit vacated and remanded for resentencing, however. It concluded that the district court erred in departing because section 3B1.3 provided an upward adjustment for the special circumstances cited by the district court. Section 3B1.3 provided for an adjustment because "[a] babysitter is in a position of trust, and this position certainly enables him to commit a sexual crime more easily than a man on the street."⁵⁵

While courts have looked to supervision, authority, and control to define the "position of trust," however, they have not yet acknowledged that crime within the scope of employment is the most common feature in the cases upholding application of the upward adjustment.⁵⁶ United States v. Parker is a good example of

⁵⁴ See United States v. Zamarripa, No. 89-2145, slip op. at 2 (10th Cir. June 11, 1990).

⁵⁵ See Zamarripa, No. 89-2145, slip op. at 5-6.

⁵⁶ See Drabek, slip op. at 6087-90 (adjustment where janitor committed bank larceny while on duty); Foreman, slip op. at 6200-01 (police officer attempted to use badge associated with law-enforcement position to escape search at airport); Ehrlich, 902 f.2d at 330-31 (bank loan clerk embezzled during course of employment); Zamarripa, slip op. at 5-6 (babysitter abused child while on duty); United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491, 3516 (2d Cir. May 7, 1990) (security guard provided information about cash delivery while on duty at check-cashing firm); United States v. McElroy, Nos. 90-1040, 90-1041, slip op. (2d Cir. July 31, 1990) (bank officers misapplied bank funds).

United States v. Berkowitz, 712 F. Supp. 707 (N.D. Ill. 1989) is consistent with this interpretation. In Berkowitz, the court refused to apply the adjustment where the defendant stole documents from a United States Attorney's office while he was there to review

this phenomenon. Defendant Parker had a job as an armed security guard at a check-cashing firm in Elizabeth, New Jersey. This firm delivered large amounts of cash to corporate clients in New York City.⁵⁷ Parker conspired to rob a vehicle of the check-cashing firm as it made a delivery to a building in New York. On the day of the robbery, Parker learned of the delivery schedule of the vehicle and passed the information on to his co-conspirators. Parker also provided a description of the vehicle. Parker's co-defendants ambushed the vehicle as it arrived to make a cash delivery, shooting two payroll guards in the process.

Parker appealed from his sentence under the Guidelines, arguing, among other things, that he should not have received a two-point upward adjustment for abuse of a position of trust under section 3B1.3.⁵⁸ The Second Circuit dismissed the argument, reasoning that "Parker was the only defendant who [on the day of the robbery] was a Payroll employee."⁵⁹ A co-defendant "had not worked there in two months, and it could only facilitate his planning and the execution of the crime to have confirmation from an insider as to the description of the Payroll car and the time it was likely to arrive."⁶⁰ Parker had to concede that "because of

documents as a part of discovery in a criminal case in which he had been indicted. See id. at 709. The district court, in a one-sentence analysis of the issue observed that the defendant "simply took [illegal] advantage of an opportunity." Id. Berkowitz did not commit his offense within the scope of employment.

⁵⁷ See Parker, slip op. at 3494-95.

⁵⁸ See id. at 3516.

⁵⁹ Id.

⁶⁰ Id.

his position he 'could have confirmed the details of car, personnel and route that were already known by [the co-defendant], and upon which he had planned this robbery.'"⁶¹

The courts' apparent equation of employment with "position of trust" is inconsistent with the Commission's view of the adjustment. The Commentary to section 3B1.3 explains that the "ordinary bank teller" who embezzles at work should not receive the adjustment.⁶² Because the Commission excludes the bank teller from the universe of defendants who could receive the adjustment, it must have meant that "position of trust" is not synonymous with scope of employment. Yet every court to publish a decision on the subject has upheld application of the adjustment where the defendant has committed the offense within the scope of employment.⁶³

The federal appellate courts can hardly be blamed for their expansive reading of section 3B1.3, however. Such a result is almost predetermined when the courts of appeal use a deferential standard of review. While most federal circuit courts of appeal have not determined the standard of review to be employed in reviewing adjustments for abuse of a position of trust under section 3B1.3, two such courts have taken the lead and announced

⁶¹ Id.

⁶² See Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7.

⁶³ See supra Note 39.

that they will review for clear error only.⁶⁴ This deferential standard of review insulates district court decisions, but has the undesirable effect of insulating district court decisions from closer scrutiny. Borderline applications of the adjustment are less likely to be overturned at the appellate level under such a standard.

B. THE "FACILITATION" PRONG

The second prong of section 3B1.3 requires sentencing courts to determine whether the abuse of a position of trust has "significantly facilitated the commission or concealment of the crime."⁶⁵ This is a causation requirement to ensure that there is a nexus between the abuse of a position of trust and the criminal offense.

Thus far, the courts have not used the facilitation prong to limit application of the adjustment. Without much critical analysis, the courts have merely emphasized the importance of a defendant's special knowledge of the crime scene or victim in

⁶⁴ See Drabeck, slip op. at 6089 (district court's factual finding that defendant abused a position of trust reviewed for clear error); Ehrlich, 902 F.2d at 330 ("A district court's application of § 3B1.3 is a sophisticated factual determination that will be affirmed unless clearly erroneous."); see also Wilkins & Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 520 (1990) ("the burden of persuasion as to specific offense characteristics and other offense level adjustments properly should rest with the party asserting their application"). But see Foreman, slip op. at 6197 (issue "whether an upward adjustment under § 3B1.3 is proper" is a legal issue and reviewed de novo, but "factual issue" of whether defendant's "conduct significantly facilitated the concealment of her crime" is reviewed for clear error only).

⁶⁵ Guidelines Manual § 3B1.3, at 3.7.

discussing the facilitation requirement. For instance, in Parker, the defendant-security guard argued that his job at a check-cashing firm could not have facilitated the commission of the robbery of a payroll car connected to the firm.⁶⁶ The Second Circuit disagreed, reasoning that "it could only facilitate [the] planning and execution of the crime to have confirmation from an insider as to the description of the payroll car and the time it was likely to arrive."⁶⁷

Similarly, in Ehrlich, defendant argued that her job as a bank loan clerk merely afforded her an opportunity to embezzle "'that could have as easily been afforded to other persons.'"⁶⁸ Thus, she argued, the adjustment under section 3B1.3 was improper. The Fifth Circuit conceded that "[p]erhaps any number of . . . employees could have obtained and executed the same instruments, debit and credit slips, and then routed them" to the data processing center.⁶⁹ However, defendant's "position of trust gave her specialized knowledge of the [data processing] system, as well as information about non-reconciled MedCentre accounts, that few other employees shared. More importantly, Ehrlich's position gave her the

⁶⁶ See Parker, slip op. at 3516.

⁶⁷ Id.

⁶⁸ Ehrlich, 902 F.2d at 331 (quoting Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7). Ehrlich's argument is not surprising given the language in the application note (viz., "an opportunity that could have as easily been afforded to other persons"). This language could be read to suggest that a position of trust does not contribute "in some substantial way" to the facilitation of the crime unless only one person enjoys the privileges of that "position of trust."

⁶⁹ Id.

authority to routinely initiate loan balancing transactions, which facilitated embezzlements."⁷⁰

One court could have put some teeth into the facilitation requirement, but it left the requirement toothless. In United States v. Foreman, a Missouri police officer arrived at Los Angeles International Airport, and was detained for questioning by Drug Enforcement Agency officers who observed her engaging in suspicious activity.⁷¹ When the agents identified themselves, Foreman showed the agents her police badge and stated that she was an active police officer. Her efforts did not avail. The agents eventually arrested her for possession of a controlled substance.

In determining Foreman's sentence under the Guidelines, the district court included a two-point upward adjustment, concluding that Foreman had "use[d] her employment as a police officer to attempt to deflect the investigation of her, and thus to attempt to escape responsibility for her criminal activity."⁷² Foreman appealed from her sentence, arguing, among other things, that "the use of her police identification did not abuse her position of trust 'in a manner that significantly facilitated' her crime."⁷³ "[Any] efforts on her part to use her position as a police officer to avoid investigation were unsuccessful and thus could not have

⁷⁰ Id.

⁷¹ See Foreman, slip op. at 6194.

⁷² Id. at 6201 (quoting district court's findings and conclusions) (emphasis added).

⁷³ Id. at 6197.

'significantly facilitated' her crime."⁷⁴

A divided panel of the Ninth Circuit disagreed with this argument, holding that section 3B1.3 "may be read to provide an adjustment for abuse of a position of trust that significantly facilitated the attempted concealment of the offense."⁷⁵ Without first determining whether the language of section 3B1.3 is ambiguous, the court inferred an attempt provision by engaging in a linguistic analysis of the word "facilitate" and a far-flung examination of sentencing for attempts in other areas of the Guidelines.⁷⁶ The court determined that "the guideline's use of the word 'facilitated' implies that the drafters of this section intended it to apply to any abuse of a position of trust which significantly made it easier to commit or conceal a crime, regardless of the success of that abuse."⁷⁷ The court recognized that the Sentencing Commission specifically provided for attempts in other sections of the Guidelines and did not do so in section 3B1.3, but determined that this fact was not controlling, given its understanding of what it called the "Commission's overall Guidelines policy on attempts."⁷⁷

The dissent appears to be correct, however, when it describes the majority opinion as "enlarg[ing] the language of section 3B1.3 far beyond anything the language of that provision can reasonably

⁷⁴Id.

⁷⁵Id. at 6200 (emphasis added).

⁷⁶See id. at 6197-98.

⁷⁷Id. at 6189.

⁷⁷See id. at 6200.

bear."⁷⁸ The majority "looks past the unambiguous language of the statute in order to justify its rather odd 'implication' that an unsuccessful effort to facilitate is the same as having 'significantly facilitated.'"⁷⁹ The majority's disregard of the official Commentary, which requires a finding that the abuse of trust "contributed in some substantial way" to facilitating the commission or concealment of the crime, compounds the majority's misreading of the Guideline's language.⁸⁰ An attempted abuse of a position of trust cannot have a "substantial" effect on facilitating the concealment of an offense because an attempt, by definition, means a lack of ultimate success. Moreover, the dissent properly questions the wisdom of inferring some overall Guidelines policy on attempts from a general section which refers only to base offense levels and not adjustments.⁸¹

Another point bears mentioning here. The Foreman court failed to consider whether the defendant's sentence could have been enhanced under a different guideline section. This appears to have been a mistake because section 3C1.1 provides for an upward adjustment in the defendant's base level where the defendant "willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense."⁸² The Commentary to this

⁷⁸Id. at 6202 (Reinhardt, J., dissenting).

⁷⁹Id. at 6205 (Reinhardt, J., dissenting).

⁸⁰See id. at 6205-06 (Reinhardt, J., dissenting).

⁸¹See id. at 6207 (Reinhardt, J., dissenting).

⁸²Guidelines Manual § 3C1.1, at 3.9 (see the Appendix to this

enhancement section explains that it reaches defendants who "conceal[] material evidence, or attempt[] to do so."⁸³ This language appears to apply to Foreman, who attempted to impede or obstruct the administration of justice by flashing her police badge in hope of avoiding a search.

IV. THE BUILT-IN ADJUSTMENT

A. The Overbreadth Problem

Section 3B1.3 states that it may not "be employed if an abuse of trust ...is included in the base offense level" of the crime for which the defendant has been convicted.⁸⁴ The Commission sometimes indicates where the adjustment has already been accounted for in the base offense level for the offense by noting this fact in the Commentary to the relevant guideline.⁸⁵ Where the Commentary states that the adjustment is not applicable, we may assume that it has been built into the base offense level for the crime. On the other hand, where the Commentary states that the adjustment is applicable, we may assume that the base offense level does not already take into account the abuse of a position of trust factor.

For instance, the adjustment of section 3B1.3 does not apply

article).

⁸³Id. § 3C1.1, at 3.9, Commentary, Application Note 1(a).

⁸⁴Id. § 3B1.3, at 3.7.

⁸⁵Cf. United States v. Fuente-Kolbenschlager, 878 F.2d 1377, 1380 (11th Cir. 1989) ("Had the Sentencing Commission intended to exclude the applicability of the special skill enhancement of guideline 3B1.3 from sentences computed under guideline 2B5.1, we must conclude that it would have done so in the Commentary to the base offense level guideline.").

where the defendant is a present or former federal officer who has engaged in conduct involving a financial or non-financial conflict of interest.⁸⁶ The logic here must be that the conduct of such a federal official is, by definition, an abuse of a position of public trust; therefore, imposing a sentence enhancement for the abuse would be redundant.⁸⁷ The base offense level for the crime accounts for the abuse of a position of trust element.

On the other hand, the adjustment does apply "[i]n the case of a defendant who was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a)."⁸⁸ Likewise, a fiduciary of an ERISA or welfare benefit plan is, by definition, in a position of trust and therefore should receive an

⁸⁶See Guidelines Manual § 2C1.3, at 2.36.

⁸⁷ Defendants made this argument to no avail in United States v. McElroy, Nos. 90-1040, 90-1041, slip op. (2d Cir. July 31, 1990). Defendants, officers in Vermont banks, were convicted of several offenses, including conspiracy to misapply bank funds. They argued that they should not have received an upward adjustment for abuse of a position of trust because an adjustment for that factor was already included in the base level for the offense. The Second Circuit disagreed. The court noted that the offense encompasses criminal conduct by any person who is "an officer, director, agent or employee of, or connected in any capacity with" a federally insured bank. Id. Since not all of these positions are necessarily positions of trust, abuse of trust is not necessarily part of the offense. This was an aspect not accounted for in the base level of the offense.

McElroy suggests that the abuse of a position of trust adjustment may become commonplace in the Savings and Loan fraud cases now working their way into the courts.

⁸⁸See id. § 2E5.4, at 2.69. Section 501(a) acknowledges that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." 29 U.S.C. § 501(a)(1988).

automatic adjustment when he steals or embezzles from the plan.⁸⁹ In these cases, we can assume that the base offense levels do not already contain a built-in adjustment for the abuse of a position of trust because the Commentary indicates that the adjustment should be made. The Commission has mandated application of the enhancement only for a class of defendants who fit squarely within the parameters of the "abuse of a position of trust" notion.

Where the Commission makes it clear that the "abuse" notion is or is not built into the offense, there is little difficulty in deciding whether the adjustment should be applied. It is not always clear, however, whether certain types of defendants should receive the adjustment.

For example, sometimes the Commission relies upon a hazy distinction to indicate which types of defendants should receive the adjustment. The Commentary to the base offense level guideline for insider trading states that "[s]ection 3B1.3 ... should be applied only if the defendant occupied and abused a position of special trust."⁹⁰ Examples of persons in positions of "special trust," we are told, "might include a corporate president or an attorney who misused information regarding a planned but

⁸⁹See Guidelines Manual § 2E5.2, Commentary, Application Note 2, at 2.68 (stating that a "'[f]iduciary of the benefit plan' is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan").

⁹⁰Guidelines Manual § 2F1.2, Commentary, Application Note 1, at 2.74 (emphasis added).

unannounced takeover attempt. It typically would not apply to an ordinary 'tippee.'"⁹¹ The distinction between "special" and "ordinary" trust is not fully developed here; the Commentary barely sketches out a concept that is supposed to guide courts on difficult decisions.

At other points, the Guidelines treat an offense as if it invariably includes an "abuse" factor, even if it may not. For instance, in Guidelines section 2C1.6 the Commentary proscribes application of the section 3B1.3 adjustment in sentencing for several crimes, including the offering of loans or gratuities to bank examiners or the offering of anything of value for procuring a loan or discount on commercial paper from a Federal Reserve bank.⁹² By proscribing application of the adjustment for these crimes, the Commission suggests that the base offense level already takes into account the "abuse of a position of trust" factor. Yet, some defendants who are sentenced under section 2C1.6 may not, in fact, abuse a position of trust. Defendants who offer or give gratuities, for instance, would not appear necessarily to abuse

⁹¹Id., Commentary, application note 1. The academic literature is full of useful discussions about the many ways in which corporate and market insiders occupy and can abuse their positions of trust. See, e.g., Andre, A Preliminary Inquiry Into the Utility of Vote Buying in the Market for Corporate Control, 63 S. Cal. L. Rev. 533, 636 (1990) ("managers who have unlimited access to the corporate coffers are clearly in a position to abuse their trust"); Estreicher, Securities Regulation and the First Amendment, 24 Ga. L. Rev. 223, 301 (1990) ("The state may justifiably concern itself with . . . personalized encounters [between a professional investment advisor and client] not because the communications lack first amendment protection, but because they present opportunities for abuse of the professional's position of trust, overreaching, and fraud.").

⁹²See Guidelines Manual § 2C1.6, Commentary, Application Note 1, at 2.38.

positions of trust. A defendant who is convicted of offering a bribe to secure a loan from a Federal Reserve bank would be sentenced under section 2C1.6.⁹³ Such a person, however, may not abuse a position of trust in the same way that a Federal Reserve bank officer would by accepting the bribe. Nevertheless, section 2C1.6 is said to have a built-in adjustment for the abuse of a position of trust aspect, even though there is a potential class of defendants who may not be guilty of such conduct.

B. The Underinclusiveness Problem

While the Guidelines sometimes indicate that certain offenses include built-in adjustments for abuse of a position of trust, they inexplicably fail to state whether other offenses already contain the built-in adjustment. The Ninth Circuit noted this peculiarity in Drabeck.⁹⁴ There, the court found itself unable to understand why the "ordinary bank teller" does not, as a matter of law, abuse a position of trust when he/she embezzles from the bank.⁹⁵ The court speculated that perhaps the abuse of trust adjustment is already built into the base offense level for the crime of embezzlement.⁹⁶ The court noted several cases "suggesting" this

⁹³See Guidelines Manual § 2C1.6, at 2.37.

⁹⁴See United States v. Drabeck, No. 89-30237, slip op. at 6083, 6087-90 (9th Cir. June 14, 1990).

⁹⁵ Cf. United States v. Fousek, No. 89-5358, slip op. (8th Cir. Aug. 29, 1990) (bankruptcy trustee, convicted of embezzling funds from Chapter 13 debtors, does not challenge upward adjustment under Guidelines section 3B1.3 for abuse of a position of trust).

⁹⁶ But see id. (defendant does not appeal issue of upward adjustment for abuse of a position of trust for embezzlement).

fact, but wondered why the Commission had not made this explicit.⁹⁷

The confusion in Drabeck is not surprising. Embezzlement would appear to be one of those crimes where most, if not all, defendants would abuse positions of trust. Yet the embezzlement section in the Guidelines says nothing about whether this fact has been accounted for in either the base offense level for the offense or the specific offense characteristic.⁹⁸ In its one example defining the limits of section 3B1.3, the Commission instructs that a bank teller who embezzles does not abuse a position of trust.⁹⁹ Yet at other points in the Guidelines the Commission explicitly provides for the adjustment in the case of embezzlement by other similarly situated individuals.¹⁰⁰ What separates the embezzling "ordinary bank teller" from other types of embezzlers who should receive the adjustment is not clear.

⁹⁷See id. at 6089. The Ninth Circuit in Drabeck cited United States v. Jimenez, 897 F.2d 286, 297 (7th Cir. 1990) (stating in dicta that enhancement of sentence for abuse of trust is not applicable to embezzlement); United States v. Herrera, 878 F.2d 997, 1001 n. 3 (7th Cir. 1989) (section 3B1.3 designed to prevent double-counting, thus it may not be employed if an abuse of trust is included in the base offense level); United States v. Reich, 661 F.Supp. 371, 373 (S.D.N.Y. 1987) (to sentence a lawyer under Guidelines, district court must determine whether breach of trust is built into notion of insider trading before deciding whether to adjust under section 3B1.3. But c.f. Fuente-Kolbenschlag, 878 F.2d at 1380 ("Had the Sentencing Commission intended to exclude the applicability of the special skill enhancement of guideline 3B1.3 from sentences computed under guideline 2B5.1, we must conclude that it would have done so in the Commentary to the base offense level guideline.")).

⁹⁸See Guidelines Manual § 2B1.1, at 2.17.

⁹⁹See id. 3B1.3, Commentary, Application Note 1, at 3.7.

¹⁰⁰See, e.g., id. § 2E5.4, Commentary, Application Note 1, at 2.69 (embezzlement by union officer); id. § 2E5.2, Application Note 1, at 2.68 (embezzlement by ERISA or welfare plan fiduciary).

The problems that can arise because of such ambiguity and silence on important matters are vividly illustrated in United States v. Fousek.¹⁰¹ In Fousek, the defendant, a bankruptcy trustee, pleaded guilty to embezzling from a some Chapter 13 debtors. In sentencing the defendant, the district court not only adjusted for abuse of a position of trust but also departed upwards from the sentencing range indicated by the Guidelines because the offense "caused a loss of confidence in an important institution [i.e., the bankruptcy system]."¹⁰² The Eighth Circuit Court of Appeals affirmed, rejecting Fousek's argument that the combination of the adjustment and the departure resulted in "double counting." The result for Fousek was that he not only may have been punished twice for abuse of a position of trust (once because of the adjustment provided for in section 3B1.3 and once because the base offense level for the offense may have already accounted for the abuse), but he also was punished for the effect of that abuse. The reasoning in Fousek reveals as much: "[W]hen a person in a position of public trust, as was Fousek, embezzles money from those he is bound to aid, it stands to reason that there will be some resulting loss of public confidence in that institution."¹⁰³ Fousek could reasonably argue that he was punished twice for the cause and once for the effect of his abuse.

¹⁰¹ Fousek, No. 89-5358, slip op. at ____.

¹⁰² See id. (departing by analogy to Guidelines Manual § 2F1.1, Commentary, Application Note 9, at 2.73, which states that an upward departure may be appropriate where "the offense caused a loss of confidence in an important institution").

¹⁰³ Fousek, No. 89-5358, slip op. at ____.

V. THE ADJUSTMENT IN SPECIFIC OFFENSE CHARACTERISTICS

At various points in the Guidelines, the abuse of a position of trust adjustment appears as a "specific offense characteristic." Unlike general adjustments, which appear in chapter three of the Guidelines, "specific offense characteristics" appear as subsections in base offense level guidelines in chapter two. As the name indicates, "specific offense characteristics" provide offense-specific adjustments for certain kinds of defendants and conduct. Where a base offense level does not account for particularly egregious conduct, a "specific offense characteristic" will often make amends.

The "abuse of a position of trust" enhancement appears in a slightly modified form as a "specific offense characteristic" where the base offense level guideline describes criminal conduct by certain public officials. For instance, a specific offense characteristic in section 2C1.2 provides for an adjustment where an "elected official" or "any official holding a high level decision-making or sensitive position" offers, gives, solicits, or receives a gratuity with respect to an official act.¹⁰⁴ Likewise, specific offense characteristics of sections 2H1.2 (Conspiracy to Interfere with Civil Rights) and 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property) also both provide adjustments for crimes in which "public officials" are involved.¹⁰⁵

¹⁰⁴See id. § 2C1.2(b)(2)(B), at 2.35.

¹⁰⁵See id. §§ 2H1.2, 2H1.3, at 2.84-.85.

The Commission has evidently chosen to treat differently abuses of trust by "public officials" because it views such abuses as among the most egregious possible. This is evident from the degree of enhancement accorded such "public officials." Instead of receiving the two-point upward adjustment of section 3B1.3, such "public officials" receive from four to eight-point upward adjustments when they commit the above-discussed offenses.¹⁰⁶

VI. PROPOSALS

The "abuse of a position of trust" concept suffers from ambiguity and misdirection in the Guidelines. It is difficult, if not impossible, to understand in the abstract what it means to "abuse a position of trust."¹⁰⁷ The Commission has not made the task any easier. The present Commentary to section 3B1.3 creates more problems than it solves. The example of the "ordinary bank teller" is misleading,¹⁰⁸ and words such as "substantial," "significantly," and "easily," which appear in the Commentary apparently to limit the scope of the enhancement, betrays a futile

¹⁰⁶See id. §§ 2C1.2(b)(2)(b), at 2.35; 2H1.2, at 2.84; 2H1.3, at 2.85.

¹⁰⁷See supra, at 7-13.

¹⁰⁸The Commission's decision to use a negative example (i.e., those who do not run afoul of section 3B1.3) to describe the operation of section 3B1.3 of the Guidelines was a poor choice. The problems that the courts are having in interpreting section 3B1.3 might have been reduced if the Commission had used positive examples instead. Similar difficulties will almost certainly be avoided with the "special skill" enhancement of section 3B1.3. The commentary to that enhancement provision contains affirmative examples which provide much clearer guidance. See Guidelines Manual § 3B1.3, Commentary, Application Note 2, at 3.7 (reproduced in Appendix to this article).

effort to circumscribe a concept whose bounds are unclear.

The courts to date have accepted the invitation to uneven and ultimately unfair application extended by the Commission. The only consistent factor in applying the adjustment appears to be the scope of employment.¹⁰⁹ There are, moreover, signs that the adjustment may even have a broader reach.¹¹⁰ Potential "positions of trust" abound in our society.¹¹¹ If the Commission does not amend section 3B1.3, the only real question is where the courts will draw the line. Line drawing will be a difficult task in the federal circuit courts. They are ill-equipped to delimit the enhancement for the Commission when they review district court decisions for clear error only.¹¹²

The "abuse of a position of trust" concept is not, however, devoid of meaning and potential application. Defendants who abuse positions of trust in such a way as to facilitate the commission or concealment of the offense are "more culpable" than their non-abusing counterparts.¹¹³ The law has long recognized such abuse as

¹⁰⁹See supra note 36.

¹¹⁰See e.g., United States v. Foreman, No. 89-50038, slip op. 6191, 6201 (9th Cir. June 19, 1990) (upholding application of adjustment where defendant attempted to conceal crime by using police badge to escape search).

¹¹¹It may not be too much to say that every person occupies, in the broad sense, a "position of trust" with respect to someone or something. Most of us sustain multiple trust relationships. Because these relationships are so common, sentence enhancement that arises out of these relationships has almost limitless potential.

¹¹²See supra note 43.

¹¹³See Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7.

an aspect of criminal conduct in certain crimes.¹¹⁴

A good idea, however, does not always translate into a good rule. Moral philosophers may agree that a public official who takes a bribe is more culpable than the private citizen who offers it; but would they agree that a union officer who embezzles money from the union coffers is more culpable than the bank teller who embezzles money from the bank?¹¹⁵ Here, the line drawing becomes more post hoc rationalization than principled distinction between levels of culpability.

To continue to permit sentence enhancement for those who "abuse a position of trust," it seems the Commission will first have to acknowledge that there is much social policy invested in the terms of section 3B1.3. Like the concept of "duty" in the law of torts, "trust" is a conclusion that is disguised in moral garb. The goal in sentencing under this section should be to isolate those instances where social policy and common sense dictate that the defendant should receive additional punishment. This will, of course, be an imperfect process; there may be those who "deserve" the extra punishment, but do not receive it. This process, however, will not force judges to become philosophers and sweep in defendants for sentence enhancement whose extra-culpable conduct is merely the commission of an offense within the scope of employment.

The first step in implementing such a process would be to

¹¹⁴See supra at 18-21.

¹¹⁵Compare Guidelines Manual § 2#5.4, at 2.69 (union officer receives adjustment) with id. § 3B1.3, Commentary, Application Note 1, at 3.7 ("ordinary bank teller" does not).

limit the application of section 3B1.3. As currently drafted, that section has a general application as a "role in the offense" enhancement.¹¹⁶ This article proposes that section 3B1.3 be amended to state that it is applicable only where the commentary to a certain guideline specifies its applicability. This will not affect those few guidelines where the enhancement is already accounted for as a specific offense characteristic.¹¹⁷ The amendment, however, would eliminate any confusion about whether the enhancement is already built into the base offense level for the offense.¹¹⁸ Where the enhancement is not explicitly provided for, the courts should assume it does not apply.

The commentary to section 3B1.3 should next be amended to account for the new limitation. The bank teller example would no longer be necessary because the commentaries to the other guideline provisions will provide particularized examples of when the enhancement should be applied. The commentary should be amended to make explicit that the enhancement does not apply to a defendant who attempts to facilitate the commission or concealment of the offense through his abuse of a position of trust.¹¹⁹ Attempts are

¹¹⁶See Guidelines Manual §§ 3B1.1-3B1.3, at 3.5-.7 ("role in the offense" enhancement provisions include those for an "aggravating role" or "mitigating role" in the offense).

¹¹⁷See id. §§ 2C1.2, 2H1.2-.3, at 2.35, 2.84-.85.

¹¹⁸Because the general enhancement will no longer apply, those portions of guidelines commentaries which currently state that section 3B1.3 does not apply would have to be deleted. See, e.g., id. § 2C1.3, at 2.36 (application note indicates that section 3B1.3 does not apply).

¹¹⁹This amendment would overrule Foreman, No. 89-50038, slip op. at 6210, in which the Ninth Circuit applied the enhancement where the defendant attempted to conceal her offense by flashing

already adequately accounted for in the base offense levels for the various crimes and in section 3C1.1, which provides for an upward adjustment where a defendant "willfully ...attempted to impede or obstruct the administration of justice."¹²⁰

Once the Commission has amended section 3B1.3 and its commentary in this fashion, it should then address the specific areas where the enhancement should apply. The Commission has already indicated that certain crimes contain a built-in adjustment for abuse of a position of trust.¹²¹ For these crimes, it would be inappropriate to indicate that the adjustment is applicable under any circumstances. The Commission need only concentrate its efforts on those crimes where the enhancement is not already built into the offense. While not an exclusive list, these crimes would appear to include the following: insider trading, embezzlement, criminal sexual abuse, kidnaping, abduction, theft, commercial bribery and kickbacks. For these crimes, the Commission should tailor commentary to describe the types of defendants and conduct that shall give rise to an enhancement under section 3B1.3.

In crafting such commentary, the focus should be on the nexus between the thing entrusted and the criminal offense for which the defendant has been convicted. For instance, a janitor who steals money or traveler's checks from the bank where he works should not

an out-of-state police badge. As discussed above, the reasoning of that case is suspect, at best. See supra at 15-18.

¹²⁰Guidelines Manual § 3C1.1, at 3.9.

¹²¹See, e.g., id. § 2C1.3, at 2.36.

receive the enhancement.¹²² The bank has not entrusted money or checks to him.¹²³ Conversely, the babysitter who sexually abuses the child he is hired to watch should receive the enhancement.¹²⁴ The child has been entrusted to the babysitter by the parents.¹²⁵

Phrases like "special trust," however, will not be useful in fashioning commentary. The Commission uses this term in the area of insider trading to distinguish between corporate insiders and tpees.¹²⁶ This distinction, however, does not rest on some easily intelligible difference between "special" and "ordinary" trust. The distinction is based on a judgment that a factual distinction between two types of defendants should have some relevance in

¹²²I refer here, of course, to United States v. Drabeck, No. 89-30237, slip op. 6083 (9th Cir. June 14, 1990), where the Ninth Circuit upheld application of the enhancement. See id. at 6088.

¹²³This reasoning would also reverse the result in Foreman, where the Ninth Circuit upheld the enhancement for a Missouri police officer who attempted to conceal her offense of possessing narcotics by flashing her police badge. See Foreman, No. 89-50038, slip op. at 6196. Here there is little or no nexus between the criminal act (possession of narcotics) and the position of trust -- the job as a police officer. Similarly, in United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491 (2d Cir. May 7, 1990), the check cashing firm's delivery vehicle had not been entrusted to the defendant or his co-defendants in any way. See id. at 3494-96.

¹²⁴This example is based on United States v. Zamarripa, No. 89-2145, slip op. at ____ (10th Cir. June 11, 1990).

¹²⁵Similarly, the bank loan clerk in Ehrlich would receive the enhancement (unless embezzlement already contains a built-in adjustment) because she was entrusted with the very accounts from which she embezzled. See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

¹²⁶See Guidelines Manual § 2F1.2, at 2.74.

of trust" enhancement. At the outset, however, the Commission should revise its approach to prevent overuse of an ambiguous and dubious sentencing tool.

APPENDIX

Selected Provisions of the Federal Sentencing Guidelines:

\$3B1.3 Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed in addition to that provided for in §3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

Commentary

Application Notes:

1. The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.

2. "Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

Background: This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. Such persons generally are viewed as more culpable.

\$3C1.1 Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

Commentary

This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in

respect to the instant offense.

Application Notes:

1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:

- (a) destroying or concealing material evidence, or attempting to do so;

- (b) directing or procuring another person to destroy or conceal material evidence, or attempting to do so;

- (c) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding or any other judicial proceeding;

- (d) threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;

- (e) furnishing material falsehoods to a

probation officer in the course of a presentence or other investigation for the court.

2. In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.

3. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.

4. Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.